

Supreme Court, U.S.  
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No.

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IN THE

**Supreme Court of the United States**

**October Term, 2005**

**VIKA VERBITSKAYA and  
ALEXANDER VERBITSKY,**

*Petitioners,*

**v.**

**UNITED STATES OF AMERICA,**

*Respondent.*

**ON PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

**PETITION FOR WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED FOR REVIEW

I. SHOULD THE COURT ENSURE ADHERENCE TO ITS SPECIFIC DIRECTIVE THAT *BOOKER* "MUST" BE "APPL[IED] ... TO ALL CASES ON DIRECT REVIEW," SUBJECT ONLY TO "ORDINARY PRUDENTIAL DOCTRINES" AS TO REVERSIBILITY, BY ISSUING A GVR, PREFERABLY WITH EXPLICIT INSTRUCTIONS TO THE ELEVENTH CIRCUIT TO DETERMINE WHETHER PETITIONERS' SENTENCES MEET THE "PLAIN-ERROR" TEST FOR REVERSAL UNDER *BOOKER*?

II. SHOULD THE COURT STRIKE DOWN THE ELEVENTH CIRCUIT'S "STRANGE, BAD RULE," WHICH TREATS THE FAILURE TO RAISE A THEN-UNKNOWN *BOOKER* CLAIM IN AN APPELLANT'S INITIAL BRIEF AS A "WAIVER," THEREBY CATEGORICALLY BARRING CONSIDERATION OF THAT CLAIM, AS THAT RULE – EMPLOYED BY NO OTHER CIRCUIT – FLOUTS THE COURT'S SPECIFIC DIRECTIVE THAT *BOOKER* "MUST" BE "APPL[IED] ... TO ALL CASES ON DIRECT REVIEW," SUBJECT ONLY TO "ORDINARY PRUDENTIAL DOCTRINES" AS TO REVERSIBILITY?

## **INTERESTED PARTIES**

There are no parties to the proceeding other than those named in the caption of the case.

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## **PETITION FOR WRIT OF CERTIORARI**

Vika Verbitskaya and Alexander Verbitsky respectfully petition the Supreme Court of the United States for a writ of certiorari to review the judgments of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in 11th Cir. Case No. 03-11870 on April 21, 2005, and reported at 406 F.3d 1324 (11<sup>th</sup> Cir. 2005).

### **OPINION BELOW**

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgments and convictions of the United States District Court for the Southern District Florida, is contained in the **APPENDIX A**.

### **STATEMENT OF JURISDICTION**

This Petition has been filed within 90 days of August 8, 2005, the date the United States Court of Appeals for the Eleventh Circuit denied Verbitsky's Petition For Rehearing En Banc, a copy of which is contained in the **APPENDIX B**. See SUP. CT. R. 13. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

### **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

The constitutional provisions, statutes and rules involved in this case are:

U.S. Const. amend. VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have

compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Title 18 U.S.C §3553(b)(1) (*pre-Booker*):

Application of guidelines in imposing a sentence. –

(1) In general.– Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a) (4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

Fed. R. Crim. P. 52(b):

Plain error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

## STATEMENT OF THE CASE

### A. PROCEDURAL HISTORY

On September 21, 2001, Vika Verbitskaya, and her former husband, Alexander Verbitsky, were charged in a two count indictment with conspiring to extort (Count I) and attempting to extort (Count II) five Russian paintings, a Weber piano and money from Verbitskaya's former paramour, Stanislav Khazanov, in violation of §§ 1951(a) and 1951(b)(3). (App. F.)

On June 17, 2002, Verbitskaya and Verbitsky went to trial and, on June 25, 2002, were convicted of both counts. The jury was not asked to make and did not make any special findings as to sentencing enhancements. Prior to sentencing, Petitioners filed a series of objections to the sentencing calculations proposed by the Probation Officer. (See Dist. Ct. Docket Nos. 111, 128, 130.) In these objections, Petitioners argued that the Probation Officer erred in recommending the use of the "extortion" guideline, U.S.S.G. § 2B3.2(a) – which imposes a base offense level of 18 – rather than the "blackmail" guideline, U.S.S.G. § 2B3.3 – which imposes a base offense level of 9. (DE 111, 128.) Petitioners also objected to the Probation Officer's recommendation that the extortion exceeded \$250,000, thereby increasing Petitioners' guideline score by an additional 3 levels. (*Ibid.*) Verbitsky objected to an additional 6-level enhancement under U.S.S.G. § 2B3.2(b)(3)(A)(ii). (*Ibid.*) And, Verbitskaya moved for a downward departure due to the deportation consequences of her conviction and the need to care for her teenage son. (DE 115.)

Petitioners were sentenced on April 9, 2003. At that time, the district court, operating under the mandatory directives of the pre-*Booker* Federal Sentencing Guidelines, ruled on and rejected all of the petitioners' objections to the Probation Officer's proposed calculations of the Guidelines. All of the district court's findings were based on a "preponderance of the evidence" standard, rather than on a "beyond a reasonable doubt" standard. Similarly, the